Firms Walk Tightrope on Privacy Issues

By JIM SCHACHTER,
Times Staff Writer

12/20/87 LA Times

All of a sudden, Richard Schowengerdt's secret life wasn't a secret anymore.

Security guards, searching his office at the Naval Industrial Reserve plant in Pomona where he worked as a civilian engineer, found a packet of the explicit letters he had been exchanging with women he contacted through personal ads in swingers newspapers.

The consequences of the August, 1982, investigation were severe. Schowengerdt was cleared by the U.S. Postal Service of charges that he was sending pornography through the mails. But he was dismissed from the Naval Reserves on the grounds that the letters, which bragged of bisexual exploits, indicated he was involved in homosexual activities—an allegation he denied. And there was a long delay when he sought a security clearance for another defense industry job.

Most painful, though, was that an intensely private aspect of the 57-year-old Costa Mesa man's life was exposed for his co-workers and family to see. His privacy was invaded, Schowengerdt says, and the resulting humiliation was profound.

"How do you put a value on this sort of thing?" Schowengerdt said, trying to describe his anger and embarrassment. "The damage it does to your psyche is not measurable."

All the same, Schowengerdt wants a court to put a price on the damage. He is suing the federal government and General Dynamics, which operates the Pomona

Please see PRIVACY, Page 6

PRIVACY: Laws Under Debate

Continued from Page 6

man-Marcus officials declined to comment.

In addition to state laws restricting the disclosure of medical data about employees, many employers have tailored policies of their own to protect the privacy of such information—especially as companies develop employee assistance programs guaranteeing confidential help for workers with drug, alcohol or personal problems. Yet workers complain that the protections sometimes break down when front-line supervisors are called upon to administer them.

Circulating Information

IBM, for example, is widely considered a leader in crafting privacy policies and in urging other corporations to adopt them. The computer company gives all its managers training in the importance of respecting workers' privacy.

But Robert Bratt, an administrative specialist in IBM's corporate branch office in Boston, has been battling the company for eight years over what he contends was an embarrassing invasion of his privacy that violated IBM's own rules.

In a lawsuit pending in a Massachusetts court, Bratt charges that his rights were violated when a physician's offhand assessment that he was "paranoid" and needed psychiatric help was broadly circulated within IBM management. A supervisor had sent Bratt to the doctor after he expressed dissatisfaction with the firm's "open door" complaint program.

A federal appeals court has ruled that Bratt is entitled to a jury trial in which IBM's business need to circulate the medical information will be balanced against his interest in preserving his privacy. Attorneys say the case will establish important rules concerning the use of information gathered through corporate medical programs.

IBM declined to comment on the case. Bratt still works for the company, but says he that has had to sell his home to pay the legal fees for the continuing court battle.

The costs to business of resolving privacy disputes through civil litigation unnerve management lawyers, who object to seeing legal tactics they consider better suited to personal injury cases producing million-dollar verdicts in the employment arena.

No Expectations

But attorneys representing workers in privacy cases say it may take costly losses in court to win respect from employers for workers' rights. "Government's not going to clean up the businesses," said Joseph Posner, an Encino lawyer. "But the lawsuits have an effect."

One effect of the litigiousness has been that some lawyers have instructed their employer clients to inform workers up front that their conduct at work will be an open book. Several key court rulings have held that employers can be found liable for invasions of privacy only if they have given their workers an expectation of privacy. So if workers know their lockers or cars may be searched, the lawyers say, a company is less likely to find itself in court once a search is conducted.

"You do not want them to have a reasonable expectation of privacy," said attorney Robert Millman, managing partner of Littler Mendelson Fastiff & Tichy, a Los Angeles-based labor law firm that represents management exclusively. Instead, he said, employees should "realize if they come to the place of work, the employer is going to be opening up anything, any time, any place."

Management consultants at the Merchants and Manufacturers Assn. in Los Angeles counsel business to take a less adversarial approach to minimizing the risk that disgruntled employees will file privacy-related lawsuits.

"The bottom line is to use good judgment and do what's right," said senior consultant Harold J. Childs. "If you really want a lawsuit in a hurry, destroy someone's dignity."

Under current legal standards, though, employees should not get cocky either, noted Burl McColm, another senior consultant at the association.

"The question is: What rights of privacy do I have as an employee?" McColm said. "The answer is: There aren't a lot."

PRIVACY: Courts Become the Battleground in Issues of Worker Rights

Continued from Page 1

plant. The case, pending in U.S. District Court in Los Angeles, is just one in a swelling tide of litigation over the extent to which employees give up their right to privacy when they cross the threshold of the workplace.

In unprecedented numbers, workers are pitted against their employers in American courts over an expanse of privacy questions with no easy answers. A recent study by the private Bureau of National Affairs found 20 times as many workplace privacy suits decided by U.S. courts in the last three years as in the three years before. Since 1985, jury verdicts in favor of aggrieved workers have averaged $316,000, according to the study. As recently as 1979 and 1980, no workers won compensation from privacy suits, the study found.

"All of us who are doing labor law, whether from management or labor, are dealing with these issues," said Alan Friedman, chairman of the Los Angeles County Bar Assn.'s labor law section. "That is the emerging area."

No Guarantees

Litigation over employee drug testing has received the most notice. But other issues pitting workers against bosses in court are just as tough:

Do employers have any business testing workers or job applicants for AIDS? Can supervisors listen to a telephone operator's phone calls? Should they be allowed to program computers to flash subliminal messages to influence employee behavior? If polygraph tests are considered unreliable in criminal trials, can their results be used as the basis for hiring or firing employees? Can a company fire a worker because supervisors don't approve of whom he or she is dating? Should managers have access to their underlings' medical records? And just how private is an office or a locker or a desk—or an employee's car parked on the employer's lot?

The answers have proven hard to find, because worker privacy is an area of great uncertainty in the law. Some states regulate aspects of workplace conduct. Califor-

thing—a litigation explosion in which non-unionized workers have participated since winning recognition during the last decade of their right to sue for wrongful termination.

Attorneys representing workers, moreover, say business has invited a barrage of lawsuits by seizing on the conservative political climate of the Reagan years to try to expand its control over employees. At the same time, competitive pressures have given companies little choice but to seek new ways to increase productivity. New technologies—from devices that can monitor computer operators' every keystroke to low-cost drug-testing systems—have given employers seeking that productive edge the ability to probe into aspects of workers' lives and performance that previously were considered off limits, or at least impossible to supervise.

"We're seeing more and more attempts to reach out into very private areas of folks' lives," said JoAnne Frankfurt, an attorney with the Employment Law Center in San Francisco.

For their part, employers and management attorneys insist that most businesses are trying to respect workers' privacy. But companies, they explain, are being tugged in many directions at once.

Society's concern about drug abuse, for instance, provokes firms to crack down in ways some workers consider intrusive. The preventive steps companies take to protect workers from drug- and alcohol-abusing or AIDS-infected colleagues may prevent litigation

> 'The bottom line is to use good judgment and do what's right. If you really want a lawsuit in a hurry, destroy someone's dignity.'
>
> —Harold J. Childs, senior consultant

er job. Managers called her in to discuss the situation, tempers flared and Carr was fired.

"I left and went straight to a lawyer's office," she recalled earlier this month. "I didn't even go home first. I was outraged, to say the least."

Her lawsuit charging a violation of federal wiretapping laws eventually was settled out of court—but not before the 11th Circuit U.S. Court of Appeals ruled that employers could only monitor calls that were clearly related to the company's business. Supervisors were obliged to hang up, the court said, as soon as they realized a call was personal.

Despite the ruling, unions representing office workers have continued to fight for state and federal legislation to regulate phone monitoring, contending that it invades both workers' and consumers' privacy. Business groups oppose a House bill authored by Rep. Don Edwards (D-San Jose) that would require a beep tone placed on all monitored calls. Employers say monitoring must be secret if supervisors are to be able to judge how employees typically handle calls.

Other forms of high-tech supervision are so new that they have not become the subject of litigation. Privacy experts and some worker groups, though—including the Communications Workers of America, the United Food and Commercial Workers, the American Civil Liberties Union, the National Assn. of Working Women and some federal employee unions—have begun calling for a national debate on the use in the workplace of computer monitoring, genetic screening and still-speculative procedures such as brainwave monitoring that could be used to assess workers' attitudes or to pace and measure work output.

Lie Detectors

"In the past, there have been certain limitations, restrictions, barriers and boundaries that everybody knew about," said Gary Marx, a professor of sociology at the Massachusetts Institute of Technology who has written extensively on workplace privacy

NEIL BRAKE

Carmie Watkins Carr went straight to a lawyer's office after a personal phone call led to her firing.

can vary considerably from state to state, and depending on whether a worker is employed in the public or private sector.

In New Jersey, a court ruled in 1984 that Jon Slohoda, a United Parcel Service employee, could not be fired because he was having an adulterous affair. But Patricia McCluskey had no legal protection in Illinois when she was fired by Clark Oil & Refining for marrying a fellow employee. In Michigan, Ryder Truck Rental employee Rebecca Sears lost in court when she challenged her firing for merely dating a co-worker. But a Michigan court said Richard Briggs' rights were violated when he was fired from his part-time job as a North Muskegon police officer for living with a woman whose divorce from another man was not final.

The legal system is only beginning to explore the workplace privacy rights of AIDS sufferers. In California and a few other states, laws bar employers from subjecting workers or job applicants to AIDS blood testing. AIDS patients also have won legal protection under anti-discrimination laws.

But co-workers' curiosity and fear nevertheless often have made it impossible for some of those diagnosed with AIDS to keep the disease private and thereby avoid the stigma it carries—a privacy conflict that is prompting legal challenges.

Bruce Kears, 33, was a sales clerk at Neiman-Marcus in San Francisco when he was diagnosed recently with AIDS. Kears' attorney, Chris Redburn of the Employment Law Center, contends that a supervisor violated Kears' privacy and state laws on the confidentiality of medical information by announcing the diagnosis to Kears' colleagues at a staff meeting one day.

The disclosure "greatly discouraged him from going back to work, which is really pretty devastating," Redburn said. When a worker has an illness, he contended, "the employer has the right to know only what the effect on his work will be—not even the diagnosis." Kears has lodged complaints about the incident with the California Department of Fair Employment and Housing and the San Francisco Human Rights Commission. Nei-

Please see PRIVACY, Page 9

ees? Can a company fire a worker because supervisors don't approve of whom he or she is dating? Should managers have access to their underlings' medical records? And just how private is an office or a locker or a desk—or an employee's car parked on the employer's lot?

The answers have proven hard to find, because worker privacy is an area of great uncertainty in the law. Some states regulate aspects of workplace conduct. California law, for instance, limits the use of lie detectors, protects the confidentiality of employees' medical records and prohibits most job-related AIDS testing. And some state constitutions—including California's—enshrine a right to privacy among their citizens' basic freedoms.

Yet the U.S. Constitution contains no explicit guarantee of a right to privacy, and federal privacy legislation is sparse. Only last month did the House of Representatives pass a bill prohibiting the use of polygraphs in most employment settings—a decade after a federal privacy commission called for such legislation.

More Control

Public employees have secured some rights from the Constitution's strictures on governmental action, including the limits on searches and seizures. But for both public-sector and private-sector workers, the rules on privacy mainly are being drawn by individual judges weighing the facts of individual cases against the murky guidelines established by precedent.

"We're treading in some new areas, and we're having to feel our way," said John N. Raudabaugh, an Atlanta management lawyer who is chairman of an American Bar Assn. committee on labor law.

Lawyers and privacy experts have many explanations for the intensification of the conflict. To begin with, Americans are suing each other more about every-

use good judgment and do what's right. If you really want a lawsuit in a hurry, destroy someone's dignity.'

—Harold J. Childs, senior consultant

by averting safety hazards while inviting lawsuits for invasion of privacy.

"There's a tension between privacy and the employer's right to make sure illegal things aren't done on their premises with their property," said Paul Grossman, a Los Angeles management lawyer.

Such quandaries have forced employers to rely increasingly on their lawyers for guidance in the most basic personnel decisions, to design formal privacy policies and to hope that some mid-level supervisor doesn't misinterpret a policy and thereby invite a suit claiming that the company not only invaded an employee's privacy but ignored its own rules in doing so.

"'Things are getting unnecessarily complicated," Raudabaugh said. "This becomes the cost of doing business in a society that, above all, is concerned with protecting everybody's rights."

The complications came home for Carmie Watkins Carr in 1980 when she worked for a company in Birmingham, Ala., that sold Yellow Pages advertising.

Carr and her fellow workers at L. M. Berry & Co. knew that the firm, like many companies that conduct a large portion of their business by telephone, occasionally monitored their calls to make sure proper sales procedures were being followed.

But Carr was infuriated when supervisors—in violation of company policy—listened to a call that she received during lunch one day inviting her to interview for anoth-

Lie Detectors

"In the past, there have been certain limitations, restrictions, barriers and boundaries that everybody knew about," said Gary Marx, a professor of sociology at the Massachusetts Institute of Technology who has written extensively on workplace privacy.

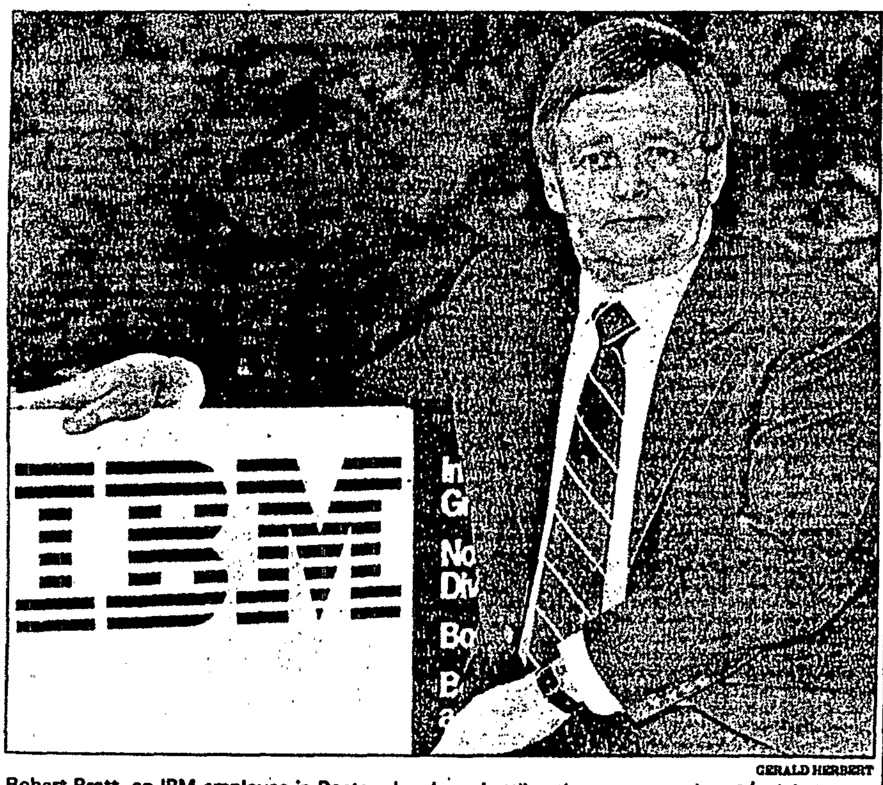
"If your employer was walking behind you—an inspector—you knew they were there and you knew what they could see. Another [thing] was that, if you did something on the weekend, what you did was your business, and it couldn't be discovered," he said. "Or if you walked inside a room and you whispered, your conversation was private. Or if you were in a dark room, you couldn't be seen.

"Those assumptions have fallen by the wayside," Marx said. "The trajectory is moving toward the all-seeing society, rather than away from it."

The lie detector, a less futuristic technology, has generated considerable litigation between employers and employees. Despite laws in California and 11 other states barring employers from requiring a polygraph test as a condition of hiring or continued employment, lie detector tests are in wide use as a means of combating pilferage and drug abuse.

Polygraphs end up in court when employers ignore legal prohibitions on their use or employees contend that they were forced to sign "voluntary" consents to tests and then challenge the results of an examination. In a case affirmed two years ago by a Maryland appellate court, for instance, a Baltimore jury awarded drug store employee Marguerite Cook $1.3 million when she was fired after refusing to take a lie detector test—the largest reported judgment in a workplace privacy case in the 1980s.

The outcome of privacy cases



GERALD HERBERT

Robert Bratt, an IBM employee in Boston, has been battling the computer giant for eight years.

2023294527